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IN THE

Supreme Court of the United States

October Term 1948

No. 52

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an eleemosynary corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO,

Appellees.

BRIEF FOR APPELLEES.

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Appellants,

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MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an eleemosynary corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO,

Appellees.

BRIEF FOR APPELLEES.

The Opinions Below.

The opinion of the Three-Judge District Court of the District of Hawaii, holding unconstitutional Hawaii's Language School Law is reported at 74 Fed. Supp. 852, and appears at Record 77. The opinion of that Court sustaining its jurisdiction as a Three-Judge Court is reported in 74 Fed. Supp. 852, and may be found at Record 87, the dissenting opinion appearing at Record 93.

Jurisdiction.

The jurisdictional statement appearing in Appellants' Brief (p. 2) is adequate; and is not repeated herein.[1]

[1]The jurisdictional problems in the case are discussed later.

Statement of the Case.

The appellants' statement of the case is accepted by the appellees. A brief further statement as to the import of the Hawaiian Statute[2] whose constitutionality is challenged by the appellees herein follows:

The Hawaiian statute prohibits the teaching of a foreign language (Sec. 1873) in any school (as defined by the statute, Sec. 1872), to any child, unless the child (1) passes the fourth grade, and (2) after the fourth grade passes from time to time certain tests described in the statute, or (3) has passed the eighth grade, or (4) has attained 15 years of age.

School is broadly defined (Sec. 1872) not only to include formal or organized schools, but to encompass "any person . . . which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice.[3]

The statute is prefaced by a "Declaration of Legislative Findings" (see Appellants' Br., Appendix I, p. 99) as to the alleged harmful effects upon children resulting from study of foreign languages under certain circumstances.

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[2]Act 104, Session Laws of Hawaii, 1943, now Chap. 31, Revised Laws of Hawaii, 1945 (set forth in Appendix I, Appellants' Brief, p. 99, hereafter to be referred to as "B").

[3]The Three-Judge Court below, speaking through Judge William F. Denman Presiding Judge of the Court of Appeals for the Ninth Circuit, called the definition of "school" in Sec. 1872 an "extraordinary definition." The unconstitutionality of the statute because of the extraordinary definition of "school" will be discussed later.

Summary of Argument.

The statute is unconstitutional in that it deprives the appellees of liberty and property without due process of law in violation of the Fifth Amendment; and of freedoms guaranteed by the First Amendment.

The statute is racist in purpose and effect. The reasons advanced in support of the statute are unsubstantial; the statute is unconstitutional, additionally and more particularly, in that it is too broad and sweeping in its terms. Measured by the clear and present danger rule, it is wanting in constitutional support.

With respect to the procedural points urged by the appellants, the United States District Court had jurisdiction over all appellees pursuant to both 28 U. S. C. 41(1) and (14). This is a proper case for equity to act because of the irreparable injury that will befall appellees if relief is not afforded. This being an adversary proceeding and there being a controversy over the constitutionality of the Territorial Act, a declaratory judgment is proper. Judicial Code Section 266 imposes a positive duty on the part of appellants to seek Territorial adjudication. Not having done so, they cannot now prevent a decision on the merits. In any event, no exceptional circumstances or specific statutory prohibition have been shown as to why the District Court or this Court should not adjudicate the merits.

ARGUMENT.

I.

The Statute Is Unconstitutional in That It Deprives the Appellees of Liberty and Property in Violation of the Fifth Amendment; and of Freedoms Guaranteed by the First Amendment.

A.

The Statute is Racist in Purpose and Effect.[4]

While differing in text in many of its provisions from its 1923 predecessor,[5] the 1943 act is of the same pattern. Both were based on prejudice against the Japanese; both were aimed primarily against the Japanese.[6] With respect to both statutes, elaborate rationalizations ill conceal their manifest racism. The former act was a post-World War I statute, and, part of a nationwide campaign result-

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[4]Hence, it comes before this Court "suspect." Cf. *Korematsu v. United States*, 323 U. S. 214, 216.

[5]The 1923 act was held unconstitutional in *Farrington v. Tokushige*, 273 U. S. 284.

The instant statute is more vulnerable constitutionally, because more sweeping in its provisions. This will be considered later.

[6]The *Farrington* case has been cited as involving a statute directed against a minority racial group.

Cf. Chief Justice Stone in *Minersville v. Gobitis*, 310 U. S. 586, 606; also in *United States v. Carolene Products*, 304 U. S. 144, 152, note No. 4.

In the *Farrington* case this Court recognized that the statute was leveled against the Japanese for the Court stated (at p. 298):

> "The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."

ing in the adoption of statutes by twenty-one states[7] urging English as our "mother tongue."[8]

The present statute was adopted during World War II. Just as the 1923 act was part of the then nationwide campaign to foster "Americanism," and was a repercussion of California's anti-Japanese campaigns, so the present statute is a backwash in Hawaii of anti-Japanese baiting

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[7]The brief in behalf of the State of Nebraska, in *Meyer v. Nebraska*, 262 U. S. 390, No. 325, 1922 Oct. Term, contains a list of the twenty-one states enacting legislation aimed at the study of the German language.

Professor Percival M. Symonds, in the only generally acknowledged scientific study of the language schools in Hawaii, said of the then attitude towards the Oriental language schools in Hawaii that:

> "This is one aspect of the broad wave of Americanization which was one of the results of the World War but is intensified by the persistent hostility of California to the Oriental on the Western coast."

(Professor Symonds' study is called, "The Effect of Attendance at Chinese Language Schools on Ability with the English Language." It was published in Journal of Applied Psychology, Vol. VIII, No. 4, p. 411, December 1924. It is in evidence as Plaintiffs' Exhibit C, R. 507. It was submitted to a Congressional Committee by Dr. R. E. Long, Superintendent of Public Instruction of the Public Schools of the Territory of Hawaii, and was declared by W. Harold Loper, then supervising principal of the Honolulu schools, as "the only objective study of this problem which I have seen." (Hearings before the Sub-Committee of the Committee on the Territories, House of Representatives, 74th Congress, 1st Session, on H. R. 3034, p. 82. Portions of the hearings are in evidence as Plaintiffs' Exhibit H, R. 553, 556.))

In the course of the same hearings, Dr. Long submitted a statement of Dr. William H. George [R. 556], Dean of the College of Arts and Sciences of the University of Hawaii, in which Dr. George said of the 1923 statute that "the attempt to abolish these Japanese language schools was the result of hysteria, and was not based upon a thorough investigation and clear thinking."

[8]In *Meyer v. Nebraska* (at p. 401) this Court observed that the purpose of the Nebraska statute was "that the English language should be and become the mother tongue of all children."

in California during World War II. Thus, California saw the revival of the enforcement of its Alien Land Law;[9] and the adoption of legislation barring Japanese from fishing;[10] Hawaii contented itself with a resurrection of its anti-Japanese language school legislation.

Moreover, enacted during the war, the present statute was adopted in the course of a vigorous "Speak American" campaign in the Territory.

Thus, in its Report urging the adoption of the present statute, the Territorial Senate Committee on Education[11] stated that "the number of foreign language schools in the Territory, as defined in the bill, which teach any foreign language other than an Oriental language to students under senior high school age or under the eleventh grade are practically nil, and none of them so far has expressed any opposition to the bill. The overwhelming majority of schools which teach foreign languages, therefore, are those which teach the Oriental languages, Japanese, Chinese and Korean, the latter being very few in number, but the Japanese language schools having been most plentiful until they were closed at the commencement of the present war. None of the Japanese language schools is operating at present due to the fact that they were all closed under martial law. It is, therefore, apparent that the regulation of foreign language schools, other than the Oriental lan-

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[9]*Cf. Oyama v. California*, 332 U. S. 633.

[10]*Cf. Takahashi v. Fish and Game Commission*, 92 L. Ed. (Adv. Op.) 1096.

[11]Report of the Committee on Education (of the Territory of Hawaii) of the Senate Twenty-Second Legislature, Regular Session of 1943, on Senate Bill No. 158, entitled "An Act to Regulate the Establishment and Operation of Foreign Language Schools" (Stan. Com. Repl. No. 123), Senate Journal 1943, pages 363-365. The Report is in evidence by stipulation [R. 452]; its text is at R. 33.

guage schools in the Territory, presents no difficult problem. Rather it is the Oriental language schools which in the past have presented and will in the future constitute, a grave problem from the standpoint of the children's welfare"[12] [R. 34].

It is clear, thus far, that the statute is aimed at Oriental schools.

The Senate Committee then showed its racist hand, however, when it observed:

> "While there is strong reason to believe that the Japanese language schools in the past have been a means of disseminating detrimental propaganda from foreign sources to the young children, your committee does not assume to try to remedy the situation from that standpoint, inasmuch as the question of what theories, ideas and ideals should be taught in private schools in one which is difficult to regulate without impinging upon the freedom of speech and personal freedom guaranteed by the constitution" [R. 34].

The repetition of an apparent belief by the Senate Committee in a claim which has definitively been repudiated by Hawaii's leading educators and by its responsible public officials, and implicitly rejected by this Court[13] is explainable only in terms of race prejudice.

Thus, in 1935, Dr. Long in his appearance before a Congressional Committee inquiring into the problem of

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[12]In 1940, there were 165 Japanese language schools, eight Chinese [R. 450, 68, 85]. The five Korean language schools (always few in number) had voluntarily ceased operation in 1940, prior to the declaration of martial law [R. 450].

In 1923, there were a total of "163 language schools in the Territory," nine Korean, seven Chinese, 147 Japanese. *Farrington* case at p. 290.

[13]In the *Farrington* case.

statehood for Hawaii [Pltf. Ex. "H," R. 554] represented that his testimony reflected pretty accurately the attitude of all of Hawaii's public school teachers [R. 353, 354]. Specifically, with respect to the alleged subversiveness of the Japanese language schools in Hawaii, he testified [R. 555]:

> "The question of loyalty brings up the topic of the language schools—particularly the Japanese language schools. From the standpoint of public opinion, both in Hawaii and on the mainland, the presence of these schools is regrettable. From the standpoint of their possible effect on citizenship, they are likely of no greater significance than the language schools of the mainland that were usually established when considerable number of any cultural group settled in the Middle Western States, particularly the German and Scandinavian groups. The history of all such schools has been that they are gradually eliminated. The second and third generations lose interest in them. There is no reason to believe that the local groups will prove to be exceptions in this respect."

He then submitted statements from "representative educators" bearing on the language school problem [R. 555]. The first was from A. L. Dean, former President of the University of Hawaii from 1914 to 1929. Dr. Dean, according to his statement [R. 555] served on the "Interracial Committee on Foreign Language Schools" which studied these institutions. Of them, he said [R. 555]:

> "'With respect to the Japanese language schools, I am pretty well satisfied on the following:
>
> "'(a) They are not sponsored nor controlled by the Japanese government.
>
> "'(b) Their purpose is not to inculcate loyalty to Japan, but is cultural and social.

"'(c) Attendance is not due to the desire of the children but of their parents.

"'(d) The chief motives of the parents are: (1) Desire that their children shall learn to read, write, and speak good Japanese and thus allow closer family ties; (2) desire that their children be instructed in good manners and gain some appreciation of Japanese culture; (3) desire that the children be kept occupied and out of possible mischief outside regular school hours.

"'(e) That the loyalty of the children to the United States is not seriously affected.'"

W. Harold Loper, supervising principal of the Honolulu schools and in school work in Hawaii since 1922, stated [R. 556]:

"'It is my opinion that the foreign-language schools of Hawaii are not un-American nor sponsored for nationalistic motives.'"

Similarly, Dr. William H. George, Dean of the College of Arts and Sciences of the University of Hawaii since 1930, said of the Japanese language schools [R. 556]:

"'In regard to the propriety of Japanese language schools in Hawaii, I am convinced that they do not constitute a menace; rather, they are a benefit to our community. They are prompted by cultural and religious motives and not by rampant nationalism. Their aim is to perpetuate the language and culture of Japan. They make no attempt to wean American citizens away from their loyalty to the United States. They do not seek to displace our public-school system, but rather to supplement it.

"'I wish to go on record, therefore, as favoring the Japanese language schools in Hawaii.'"

O. W. Robinson, supervising principal of the rural Oahu schools and deputy superintendent of schools [R. 557], discussing particularly the language schools and their "effect upon Americanization" said [R. 557]:

> "'So far as I have observed, there is no anti-Americanism in the teachings of these schools.'"

Miles E. Cary, principal of McKinley High School, expressed the view that [R. 557]:

> "'During all of my experience with the young people of Japanese ancestry at this school, I do not recall a single circumstance where a pro-Japanese or anti-American sentiment became apparent among them.'"

Finally, C. A. Anderson, principal of Mid-Pacific Institute, concluded [R. 558]:

> "'In my opinion, we need not concern ourselves about the possible negative influence of language schools in our endeavor to help boys and girls to become good citizens.'"

And following the above and similar hearings, a Joint Committee of the United States Senate and House of Representatives reported [R. 552]:

> "'Much is made of the foreign-language schools and press, but it should be realized that these agencies serve a real purpose in the adjustment of an immigrant group to new conditions.'"

Moreover, the alleged subversiveness of Japanese language schools was urged upon this Court by Hawaii's

Attorney General in the *Farrington* case;[14] and was, in effect, by this Court rejected. The Record in the *Farrington* case discloses assertions that Japanese children were taught loyalty to the Japanese Government and to the Japanese Emperor, and antagonism toward America and things American.[15]

Yet this Court said in the *Farrington* case (at p. 298), "The record discloses no adequate reason" for the legislation.

Indeed, the Attorney General in the instant case conceded below that the loyalty of those who had attended language schools is unquestioned [R. 349], and that the graduates of the public schools of Hawaii in their contribution to the war have been equally good citizens no matter their race and no matter their attendance in any language school [R. 271].

Moreover, the language schools in Hawaii remained closed by military order from December 1941 until March 1943 [R. 429]. The present statute was enacted the following month in May, 1943.

In 1943, as throughout the war, Hawaii was the scene of the pressure of a vigorous "Speak English" campaign [R. 304]. Dr. Loper, Superintendent of Public Instruc-

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[14]No. 465, Oct. Term, 1925.

[15]See particularly Bulletin filed in the *Farrington* case with this Court, published by the Bureau of Education, Department of Interior, and note reliance upon this publication by the Attorney General in his brief (at p. 134) in the *Farrington* case. The Bureau of Education survey is entitled, "Bulletin, 1920, No. 16, Department of Interior, Bureau of Education, Government Printing Office, 1920. The Bulletin is on file with the Clerk of this Court in the *Farrington* case.

tion, more aptly called it a "Speak American" campaign [R. 266].[16]

Moreover, when the instant statute was adopted, the Japanese people of Hawaii were 32.5 per cent of the total population [R. 439]. Since we were at war with Japan, neither the Territorial Senate or House had a single representative of Japanese descent. In addition, and, of course, the older Japanese, having been born in Japan, were disenfranchised from voting by our naturalization laws.

Hence, it appears that the statute was aimed at, and applies only, to racial minority groups;[17] and was adopted

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[16]The effect of the campaign was such that the Department of Public Instruction of Hawaii adopted a policy of not promoting a child that did not make a passing grade in English, even if he made excellent marks in everything else. [R. 266.] The following colloquy between Judge Denman and Dr. Loper is noteworthy:

> "So that during the pressure of the war and the attendant psychological changes in the community you went from a pedagogical to a martial administration of the study of the English language, isn't that manifest?
>
> The Witness: I guess so."

Dr. Loper conceded, however, that English was not the sole goal of education. [R. 554, 555.]

[17]The fact that the statute, on its face, does not mention Japanese is neither conclusive, nor necessarily persuasive. California's legislation against Japanese did not mention them by name, but this Court concluded that California's anti-Japanese fishing legislation was aimed against the Japanese. *Takahashi v. Fish and Game Commission, supra.* See also concurring opinions in *Oyama v. California, supra.*

Again, the statutes in the *Meyer, Bartels,* and companion cases, with the exception of the *Bohning* and *Pohl* cases, did not mention German by name; but this Court so found.

Indeed, the Attorney General conceded below that if the instant statute had specifically designated Oriental languages it would be unconstitutional, in the face of the decisions of this Court. [R. 158, 159.]

at a time when these groups were least able to protect their liberties in the legislative halls of Hawaii.[18]

This Court has declared that the right of the parents over its child's education—including the right to acquire a knowledge of a foreign language, to be a "fundamental right." (*Farrington* case at p. 299.)

The trial court below unanimously took the view that "the parent's right to have the offspring taught a foreign language is one of the fundamental rights guaranteed by the due process clause of the Fifth and Fourteenth Amendments" [R. 80].

And in the *Meyer* case (at p. 403) this Court expressly ruled that legislative action may not abridge that fundamental right, except when justified by an "emergency."[19] Hence, this Court is now requested to give the instant statute that judicial scrutiny required of "legislation restricting the civil liberty of racial . . . minorities." (Chief Justice Stone, dissenting, in *Minersville District v. Gobitis*, 310 U. S. 586, 607, citing the *Meyer* and *Farrington* cases.)[20]

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[18] *Cf.* the adoption of legislation against Alien Japanese fishermen in California in 1943, when the Japanese were evacuated from California and hence unable to protect themselves against California's legislative encroachments upon their civil liberties, noted by this Court in *Takahashi v. Fish and Game Commission.*

[19] "No emergency has arisen which renders knowledge by a child of some language other than the English so clearly harmful as to justify its inhibition, with the consequent infringement of rights long fully enjoyed." (*Meyer* case at p. 403.)

[20] *Cf. United States v. Carolene Products*, 304 U. S. 144, 153, Footnote 4, again citing the *Meyer* and *Farrington* cases as examples of legislation aimed at national minorities.

That judicial scrutiny calls for this Court to "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged statute.

Schneider v. The State, 308 U. S. 147, 161, 162;
Thornhill v. Alabama, 310 U. S. 88, 96.

B.

The Reasons Advanced in Support of the Statute Are Unsubstantial.

1. This Court Has Adjudged to Be Unsubstantial Substantially Similar Reasons Proferred in Support of Substantially Similar Statutes.

Briefly stated, the reasons advanced in support of the statute are that, in general, and particularly in Hawaii, the teaching of foreign languages, and particularly of Oriental languages, contemporaneously, to a child of immature years has the two-fold effect on the child of:

(a) Retarding his progress in properly understanding English, and hence in all studies in the public schools (since all these studies are in English) and, inaddition,

(b) Such simultaneous studies cause "serious emotional disturbances, conflicts, and maladjustments."

[Section 1871 of the Statute, Appellants' Brief, Appendix I, p. 89; discussed at length in Appellants' Brief at p. 50 *et seq.*]

It is urged, accordingly, that the instant statute differs from those held unconstitutional by this Court in the *Farrington* and *Meyer* cases; for, it is said, this statute has for its objective the protection of the children, an objective not involved in the *Farrington* and *Meyer* cases.

An examination of the decisions of this Court in the *Farrington* and *Meyer* cases, and of the records in those cases upon which those decisions were based, demonstrate the contrary.

3. Health of the Child.

Thus, in the *Farrington* case, the Attorney General of Hawaii, in his brief, stressed the serious effect of attendance in Japanese language schools, upon the *health* of the child. He urged that: The Japanese language schools ran before and after school hours so that the Japanese child's school day was practically from dawn to dusk (Brief of Territory of Hawaii in *Farrington* case, No. 465, October Term, 1925, p. 114);[21] that due to fatigue, effective instruction of the child in the public schools was seriously hampered (Brief, pp. 114, 127-130). The Attorney General relied heavily upon the findings made in a special study under the auspices of the United States Commissioner of Education, on file with the Clerk of this Court in the *Farrington* case, claiming that children suffered from mental and physical fatigue (p. 128).

Yet, this Court, as already observed, ruled that "the record discloses no adequate reason" for the legislation (*Farrington* case at p. 298).

Substantially similar claims were made to, and rejected by, this Court in the *Meyer* case. There this Court observed (at p. 403):

> "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early

[21] It is conceded that the Chinese language schools are open only after public school hours, the teaching lasting one hour and a quarter. [R. 435.]

age and experience shows that this is not injurious to the *health*, morals, or understanding of the ordinary child." (Italics supplied.)

b. "RETARDATION."

And with respect to the claim in the instant case of "retardation" as the alleged justification for the present statute, that very claim, too, was urged upon this Court in the *Farrington* case.

Thus, again, the Attorney General in his brief in the *Farrington* case (p. 114) represented that the studies in the Japanese language schools "seriously hampered effective instruction of the child in the public schools"; and particularly that instruction in the Japanese language hampered instruction in the English language. Again, he relied on the survey of the United States Commissioner of Education that (p. 128) "children cannot master two languages at once" and that (at p. 130) "the Japanese language schools have a very bad effect on the English of children."

Again, this Court must have rejected these claims, too, when it said: "The record discloses no adequate reason" for the legislation (at p. 298).

2. Responsible Educators of Hawaii Have Uniformly Repudiated the Reasons Advanced as Unsubstantial.

Thus, in 1935, as heretofore discussed in part, the Superintendent of Public Instruction of the public schools of Hawaii, Dr. R. E. Long, appeared before a Congressional Committee to testify pertaining to the language schools in Hawaii. For himself he represented that the views which he expressed reflected the attitude of the 2,723 public school teachers in the Territory [R. 554]. In

submitting statements of educators of Hawaii, he represented that the statements were "by representative educators" [R. 555].

The first statement was by A. L. Dean, former President of the University of Hawaii, who stated: "That education in the public schools is not interfered with" by the foreign language schools [R. 556].

Dr. W. Harold Loper, Supervising Principal of the Honolulu schools, observed, in his statement, "The popular opinion of a few years ago that the work of the language schools interferes with the teaching of English in the public schools is probably false" [R. 556]. He declared the study by Professor Symonds to be the only objective study of this problem which he had seen, and quoted the following from the Symonds' study:

> "(a) That the influence of the home and the playground is about four times as great as that of the Chinese language schools in causing retardation in the English language.
>
> "(b) That for better English we should let the foreign-language schools alone and turn our attention to the home, the playground, and the kind of individuals are reborn.
>
> "(c) That correct speech has a worse enemy in the 'pidgin English' of the home than in the Chinese language school.
>
> "I should expect to find the same results in connection with the Japanese language schools" [R. 556].

Dr. William H. George, Dean of the College of Arts and Science of the University of Hawaii, observed:

> "Every child should know two languages, the language of its nativity and another. It would be a distinct cultural loss if our young American citizens of

> Japanese ancestry were to neglect the language of their fathers. So valuable is this training that a goodly number of occidental children have taken advantage of it. . . . I wish to go on record, therefore, as favoring the Japanese language schools in Hawaii" [R. 556].

Again, in 1937, in his appearance before a Joint Committee on Hawaii of the Congress of the United States,[22] Dr. Long again relied upon the Symonds' study [R. 547], stating:

> "He found, so far as the language school is concerned, that there was apparently no effect on the English problem in the public schools."

And further:

> "I don't want to go on record as saying that the study of a second or third language is detrimental to good citizenship. It is not a question in the study of French. I am not familiar with any body of people who question it" [R. 547].

3. The Testimony Adduced at the Trial Demonstrates That the Reasons Advanced in Support of the Statute Are Unsubstantial.

a. With respect to the alleged effect of language schools on the health of the child—the claim of "serious emotional disturbances, conflicts and maladjustments", [Declaration of Legislative Findings, Sec. 1871, Appendix I, B, p. 99], the witnesses produced by the Territory who asserted this claim conceded:

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[22]Hearings before the Joint Committee on Hawaii, Congress of the United States, 75th Congress, 2nd Session, pursuant to S. Con. Res. 18. [Plaintiffs' Exhibit F, R. 546.]

1. That no study of the emotional effect upon the child of attendance at a foreign language school had been made in Hawaii;[23] that no study had been made by physicians, or others, of alleged neuroses arising from language difficulties.[24]

2. That the facility of the child to talk to and to communicate with its parents in the language of the parents was conducive to emotional stability;[25] and thus offset any claimed emotional instability, asserted to result from the study of such "foreign" language.

Indeed, it is the unchallenged testimony of Hawaii's leading educators before the House Committee that language schools have served as a socially and hence emotionally *stabilizing* agency.

Thus, E. F. Sayers, Director of the School of Elementary Education, University of Hawaii, who had served as

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[23]Dr. Bruce White, Professor of Education at the University of Hawaii [R. 313].

[24]Testimony of Dr. Richard Myer [R. 330]. Dr. Medora Smith admitted also that no study had been made of alleged neuroses; and that she knew of no example of a serious neurosis as the result of foreign language school attendance [R. 418].

[25]Thus, F. Deal Crocker [R. 291, 305] admitted: "It might help the child to actually understand its parents' culture a little better." Again, Dr. Bruce White acknowledged that there is a decided educational and psychological advantage in the ability of the child to converse with his parents in their own language; and Dr. J. Robert Jacobson [R. 370, 383] recognized the psychological value of an adequate language communication between parent and child. Again, Dr. Romanzo Adams, Professor of Sociology at the University of Hawaii, in an article entitled, "Functioning of the Language Schools in Hawaii," wrote [R. 220]: "The principal function of the language schools of Hawaii is to reinforce the influence of parents, to increase their prestige in the eyes of the children."

Moreover, it is apparent that in being able to communicate with their parents in the language of their parents the children "gain some appreciation of Japanese culture." See statement of Dr. A. L. Dean [R. 556, 261].

a member of a "Committee Known as the Governor's Committee on Foreign Language Schools," stated:

> "I changed my mind in the course of time, so that by 1926 I had come to look upon these schools as constructive social agencies in the Territory. Briefly, I came to see them as stabilizing factors because of the service they rendered youth that were in danger of losing the social benefits of home and family influence before they had sufficiently accepted the customs and institutions of the American community in which they were growing up" [R. 558].

And again, Dr. A. L. Dean, formerly President of the University of Hawaii, stated before the same House Committee:

> "Furthermore, the children are in a difficult transition stage from the mores of their parents to those of America. The maintenance of family control of adolescents and the giving to them of guidance is made abnormally difficult. Although I do not like the idea of the language schools, I am not at all sure that we would not find our problems of social adjustment aggravated if we did not have them" [R. 556].

In any event, one fact is certain—and that is that in the entire field of bilingualism, in general, and the emotional effects of bilingualism upon children, is, so far as the educational experts are concerned, a field is speculation or, at the most, one of exploration [R. 315].[26]

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[26]Dr. Bruce White, Professor of Education at the University of Hawaii and Acting Dean of the Teachers' College, a witness for the Territory, preferred the phrase "exploration," to "speculation" [R. 315].

b. With respect to the alleged "retardation" of children in Hawaii in the knowledge of English and progress through the public schools:

The parties are agreed that there is retardation in the knowledge of English generally in the Hawaiian Islands, and that is due primarily to the prevalent use of pidgin English [R. 254-258, 259, 269, 270, 353, 356, 357]; (*cf.* also the Symonds' study as accepted by Dr. Loper [R. 556]).

At the trial, some of Hawaii's educators testified that the foreign language schools in Hawaii are also a factor in that retardation. It is to be noted that the leading educators of Hawaii—at least in official positions—admitted on cross-examination that their present views were at variance with those expressed by them before at the Congressional Committee hearings heretofore discussed. These Hawaiian educators are: W. Harold Loper, Superintendent of Public Instruction [R. 236]; O. W. Robinson, Deputy Superintendent of Public Schools [R. 391]; and Orin E. Long, former Deputy Superintendent of Public Instruction and Acting Governor of the Territory [R. 343].[27]

In any event, the witnesses for the Territory admitted that the only scientific or *quasi*-scientific studies made with respect to the effect of foreign language schools on English in the Islands were at variance with the views they expressed at the time of the trial;[28] that these studies con-

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[27] Their testimony or statements submitted to committees of the Congress appear in the Record, as follows: Loper, 556; Robinson, 551; Long, 554 and also 547.

[28] The studies are that of Professor Symonds heretofore discussed, as well as one by Henry B. Schwartz, "A Study of the Effect of Attendance at Language Schools Upon Success in McKinley High School," Hawaii Educational Rev. 30 (Oct. 1925); the latter study is discussed at R. 212.

clude that there was *no* significant relationship between the language schools and retardation.

Moreover, witnesses for the Territory relied heavily upon a community survey of education in Hawaii [Deft. Ex. 1, R. 559, discussed in App. Br. at p. 60].

But the survey began with the admission:

> "Hawaii's School System Cannot Be Patterned Exactly Upon Any Mainland System
>
> "Hawaii should never make the mistake of trying to fit her unique youth to some mainland pattern of education. Her public school system should never become just another school system. Mainland patterns were none of them fashioned for the children of parents who represent seven cultures and have come to live as neighbors and friends on seven isolated islands, in the middle of a great ocean. These children have unique abilities, they present unique problems, and furnish unique delights" [R. 559].

The survey notes that there are:

> "Conditions Which Make Comparison With Mainland Results Less Reliable Than They Would Otherwise Be
>
> "There are factors in the situation which render the comparison with the mainland averages less trustworthy than it would ordinarily be, but it is possible to make at least a rough comparison. The tests used were all standardized on the mainland and in no case is it probable that the standards were based on results secured from testing such a large proportion of rural children or as many children of foreign-born parents as in Hawaii's schools" [R. 560-561].

It is conceded that the tests were all given in English; and that these tests, if given in certain parts of New York

City or in any other immigrant community, would similarly show "retardation."

And Hawaiian educators have on many occasions compared the "English problem" in Hawaii, as well as the role of Hawaiian language schools, with the similar "English problem" on the mainland and the role on the mainland of foreign language schools in immigrant communities. Thus, Dr. Long, in his Congressional Committee testimony [Pltf. Ex. F, R. 549, 356], observed: "Now the quality of the English spoken (in Hawaii) varies greatly, just as it does in the New York East Side district, and certain sections of Boston" [R. 549]; and specifically with respect to the foreign language schools in Hawaii, Dr. Long stated:

> "From the standpoint of their possible effect on citizenship, they are likely of no greater significance than the language schools of the mainland that were usually established when considerable numbers of any cultural group settled in the Middle Western States, particularly the German and Scandinavian groups. The history of all such schools has been that they are gradually eliminated. The second and third generations lose interest in them. There is no reason to believe that the local groups will prove to be exceptions in this respect" [R. 555].

Similarly, Harvey L. Freeland, Director of Vocational Education in the Islands, considered the problems attending the Hawaiian language schools as comparable to those involving parochial schools on the mainland, stating:

> "For 10 years I was a teacher in the Minneapolis school system, where many Scandinavian parochial schools existed. For an equal period I was connected with the State Boards for Vocational Education of

Iowa and Nebraska, where I had considerable opportunity for observe the parochial schools in those States. From 3 years of experience in the Territory, I believe that the oriental-language schools here have the same general objectives as the parochial schools in the three States named" [R. 558].

Again, Dr. Loper agreed that with respect to the tests used in the Hawaiian schools an immigrant Jewish boy in New York City or a German boy in Nebraska whose parents spoke German and who lived in a family where German was spoken would fare the same as a Japanese or Chinese boy in the tests given in the Hawaiian schools.

Dr. Robinson admitted that the pattern on the Islands [R. 396] is similar to the communities on the mainland where the immigrant population was once large and that the problem will generally take care of itself through the lapse of time.

Nor does the claim that some educators believe it to be desirable to postpone a study of a second or "foreign" language until after the child has acquired a familiarity with the first have any application to the Appellees, or to the situation in Hawaii.

The Chinese parents who desire to teach, or to have taught, their children in the Chinese language do not seek to educate their children in a *foreign* language; they seek to educate them in their mutual *mother* tongue.

Moreover, the Chinese parents desire not only to have their children taught the Chinese language, but through such teaching to have their children acquire a familiarity with Chinese culture, that they and their children may thus have a larger and deeper community of home interest,

during the period of the childhood and adolescence of their children.

Hence, to argue, as do the Appellants, that the Chinese children will, according to some educators, acquire a greater facility in speaking Chinese in later years if they are required by law to postpone a learning of that language during their early years, has no application to the desires and needs of both the Chinese parents and their children involved in the instant case.[29]

Moreover, in appraising the substantiality of the reasons advanced in support of the statute, the following conceded advantages should be borne in mind:

That familiarity with the Chinese language, particularly in Hawaii, result in (1) a community of interests between the child and the parent—that it "brings harmony in the family" [R. 152, 186]; (2) that knowledge of Chinese is especially necessary to the Chinese business and professional man to engage in his business or profession [R. 169]; (3) that the knowledge of Chinese was particularly useful during the last war [R. 203].

In the face of the foregoing conceded advantages, the asserted disadvantages must be examined in the light of

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[29]The importance of children of Chinese parents in Hawaii in acquiring familiarity with the Chinese language during the childhood is the more important in Hawaii, because of the large number of Hawaiian school children, coming from poor families, who are required to, and do, leave school at the age of fifteen or sixteen to work in the fields [R. 288, 289]. *Cf.* the observation of Judge William Denman, below:

> "Since the testimony is that a very large number of Hawaiian children of fifteen seek their own living and support at that age, it is apparent that as to most of them their parents must have taught them a foreign language before that time if one is to be acquired" [R. 80].

the apparent and obvious—that the Appellants' claims of asserted disadvantages are unsupported by any authentic body of scientific (in the field of education) study or opinion. The entire field of bilingualism is still one of exploration—if not one of speculation [R. 315]. As one expert in the field put it, "The scientific study of bilingualism is merely at its beginning."[30]

Accordingly, even if a Territorial legislature, as alleged *parens patriae*, had the broad authority claimed for it (B. 52) to overrule the parent in the education of his child, in private education supplemental to public education and after school hours,[31] it may not do so on grounds as unsupported by acknowledged scientific findings or uniform educational experience as is the instant statute.

Certainly, no educational experience in Hawaii or elsewhere, nor recognized opinion by educational experts in Hawaii or elsewhere, is of such general acceptability as to override the observation of this Court in the *Meyer* case

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[30]Dr. Seth Arsenian in "Private Language School and Mental Development" [R. 455]:

And with respect to language schools in particular, another expert [R. 217] stated: "On this matter of the influence of the language schools a tremendous deal has been said, but very little is known as (that is) scientific."

[31]This Court has said, to the contrary: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 513, 535.

In accord is the observation of Justice Harlan in *Berea v. Kentucky*, 211 U. S. 45, 67, quoted with approval by the court below [R. 81] and by the Ninth Circuit Court of Appeals in the *Farrington* case, 11 F. 2d 710, 713:

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperil the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive

(at p. 403) that "It is well known that proficiency in a foreign language seldom comes to one not instructed in an early age"—a view concurred in by Justice Holmes in *Bartels v. Iowa* (at p. 412): "Youth is the time when familiarity with a language is established."

In similar circumstances, this Court would not permit a difference of opinion among educators to determine this Court's judgment as to whether a particular practice in the schools of the United States offended the Constitution. It would not permit itself to make a modest estimate of its "competence in such specialties as public education," to "withhold the judgment that history authenticates as the function of this Court when liberty is infringed." (*Board of Education v. Barnette*, 319 U. S. 624, 640.)

In the instant case, as in the *Barnette* case (at p. 646), the reasons proferred in defense of the statute, are not "sufficiently definite and tangible to justify the invasion" of the freedom of both the parent and the child to acquire a knowledge of a language and culture of their own choosing, in a manner selected by them, and not coerced upon them by the state, against their will and consent.

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it, is a substantial right of property, especially, where the services are rendered for compensation. But, even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties," and "to be free to use them in all lawful ways." . . . If pupils, of whatever race—certainly, if they be citizens—choose with the consent of their parents or voluntarily to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily for such innocent purpose." [R. 81]

C.

The Statute Is Unconstitutional in That It Is Too Broad and Sweeping.

The instant statute compared with those held invalid in the *Farrington, Meyer* and *Bartels* cases, discloses:

1. Section 2.

Section 2 of the Statute provides:

> "Definitions. As used in this chapter: 'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice" [R. 79].

Of that Section, the Court below observed:

> "The striking provision of the Act is the extraordinary definition of what constitutes a school in which a foreign language is taught" [R. 79].

First, under this provision, the parochial schools in Hawaii are clearly included.[32] The Attorney General conceded that the parochial schools are encompassed, the court below observing:

> "There are many Hawaiian Catholic parochial schools with complete educational courses, attendance in which is an equivalent to that of the regular public schools. The defendants state the Act interdicts the

[32] A comparatively large number of children in Hawaii attend parochial schools. The figures for the island of Oahu are 7,198; those attending the public schools on the island number 47,191 [Pltf. Ex. B, R. 506].

teaching of even Latin or Greek to the children of the age and scholastic standing it seeks to affect, and "we agree" [R. 85].[33]

Then, in Hawaii, there is express statutory provision for the employment of private tutors as legal substitutes for the required attendance at the public schools [R. 145]; (Sec. 1830, Hawaiian Statutes, 1945).

It was conceded that such private tutors fall within the definition of "school" in Section 2 [R. 145].

The court below properly observed that the Statute

> "certainly would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucius, even orally, explaining the words of that spiritual guide in the language in which they are spoken and are recorded" [R. 80].

And while the Attorney General refused to concede below that a parent is included in Section 2 [R. 145], as is a private tutor, it is manifest that the clear and unambiguous language in Section 2 does include a parent: a parent is a person, too.[34] The Territorial legislature, in adopting the unusual definition in Section 2, must have intended a broad and sweeping inclusion within its terms, for it went out of its way in the 1943 Statute, to expressly

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[33]The Statute would, of course, apply to altar boys, taught in the parochial schools. It was so conceded [R. 401].

[34]It was conceded below "that parents are the best tutors sometimes" [R. 145].

Moreover, with respect to the alleged "evil" against which the Statute is aimed, it would seem that "emotional disturbances" would be the same, if not greater, whether the "foreign" language is taught by parents as by a private tutor at home or in an organized foreign language school.

enact a broad definition of "school," not contained in the 1923 Statute.

It is to be noted, additionally, that in the earlier statute, Sabbath schools were expressly excluded; not so in the instant statute.

Noteworthy, too, is the fact that in the Nebraska statute held invalid in *Nebraska District v. McKelvie* (No. 440, October Term 1922, 262 U. S. 404, 410, Footnote 3), Section 3 of that Statute expressly exempted from its provisions the parent "teaching his own children in his own home any foreign language."

2. Section 3.

In one further, and highly significant respect, is the instant statute more sweeping in its ambit than the former statute. Thus, the present Act unqualifiedly bars the teaching of a foreign language to children under the fourth grade; and permits such teaching thereafter, and through the eighth grade, only after the child's passing certain tests. The 1923 Act contented itself with a prohibition limited only to the first and second grades (*Farrington* case at p. 295).

Accordingly, while under the former statute children only up to approximately eight years of age were encompassed by it, under the instant statute, children up to approximately ten years of age are absolutely barred in the study of a foreign language; and children up to approximately fourteen years of age are "regulated" in their right to do so.

In one other respect is Section 3 vague and indefinite. "Foreign" language is not defined (either in Section 3 or anywhere else in the Statute). In this respect, too, it

differs from the 1923 Act. There, foreign language school was expressly defined as a school "conducted in any language other than English or Hawaiian." (The text of the statute appears in the *Farrington* case at p. 291.)

Similarly, in all the other statutes before this Court in the *Meyer, Bartels* and companion case of *Nebraska District v. McKelvie*, the statutes on their face disclosed that the languages aimed at were languages other than English. Not so the present statute.

What is a "foreign" language? Particularly in Hawaii, what is a foreign language? Does it include Hawaiian? The Attorney General so asserted below [R. 160]. Yet the Hawaiian language seems to have recognition as an official or *quasi*-official language in Hawaii by Section 826 of the Hawaiian Statutes which require the teaching of Hawaiian in normal and high schools and in certain public schools. Moreover, it is obvious that Hawaiian, as distinguished from English, is the original and hence domestic language in the Hawaiian Islands. Moreover, in the absence of a clear definition of "foreign" language in the Statute, may Chinese be said to be a "foreign" language when that language is used in the home by the Chinese parents and their children. Is Chinese language used under such circumstances not essentially a "domestic" or mother-tongue language rather than a "foreign" language?

Hence, the instant statute is the most sweeping of any of the foreign language statutes heretofore before this Court, in its coverage of the persons who may teach a foreign language, the children who are subject to it, and the indefiniteness as to what constitutes a foreign language.

The Statute, accordingly, in its vital provisions, is not one "narrowly drawn to cover the precise situation giving rise to the danger" (*Thornhill v. Alabama*, 310 U. S. 88, 105), but, on the contrary, "sweeps within its ambit other activities which in ordinary circumstances constitute an exercise" of a fundamental right (*Thornhill* case at p. 97).

And the failure of the Statute to define "foreign language," results in a fatal failure to define conduct with reasonable certainty. (*Cf., Winters v. New York*, 333 U. S. 507.) There must be reasonable standards of guilt. "Men of common intelligence can not be required to guess at the meaning of the enactment." (At p. 260, 92 L. Ed. (Adv. Op.).)

D.

The Statute Violates Rights Under the First Amendment.

The right of Appellee Leong Nget Cho, the teacher of the Chinese language herein, would seem to constitute the exercise of freedom of speech on his part guaranteed by the First Amendment.

That Amendment has been construed by this Court to accord a (non-Chinese) labor union leader the right to practice his profession and speak in the course of it. (*Thomas v. Collins*, 323 U. S. 516.) The First Amendment equally protects a Chinese teacher.

Furthermore, the counterpart of the freedom to teach on the part of the teacher, is the freedom to learn, on the part of the child and the freedom of the parent to have his child so learn.

If, as we urge, freedom to teach is a phase of freedom of speech, freedom to listen is its constitutional counter-

part. The First Amendment, assuring freedom to speak, protects also freedom to listen.

Moreover, the Chinese parents[35] and their children subjected to the instant statute are, in effect, not enjoined alone in the teaching and learning respectively of the Chinese language; they are equally restrained in the ideas which may be conveyed in the course of the study of the Chinese language.

And this Court has expressly decided that the *use* of Chinese is a basic civil right. (*Yu Cong Eng v. Trinidad*, 271 U. S. 500.)

The Chinese language schools, moreover, teach not only Chinese as a language; in teaching the language of Chinese, there is also taught philosophy of life and the ethics of Confucius[36] and the Manchus[37] [R. 186]. And clearly

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[35]The dismissal by the trial court of the complaint as to the plaintiff parents, Wah Chan Tom and Wilfred Chong [R. 113], is of no consequence so far as the rights of parents under the statute are concerned. No parent was a party in either the *Farrington*, *Meyer* or *Pierce* cases. Yet this Court held those statutes invalid because violating, on their face, the rights of parents. This holding was pursuant to the policy of this Court, articulated more expressly in more recent cases, that statutes affecting fundamental civil liberties are to be judged on their face; and rejected if possibilities of abuse lurk within them.

Cf.

Thomas v. Collins, 323 U. S. 516;
Thornhill v. Alabama, 310 U. S. 88, 97;
Schneider v. State, 308 U. S. 147, 162;
Hague v. C. I. O., 307 U. S. 496;
Lovell v. Griffin, 303 U. S. 444, 451;
Herndon v. Lowry, 301 U. S. 242, 261;
Stromberg v. California, 283 U. S. 359, 369.

[36]*Cf.* Judge Denman's observation that the statute would enjoin the teaching of the truths of Confucius in the Chinese language [R. 80].

[37]According to Dr. William H. George, Dean of the College of Arts and Sciences of the University of Hawaii, the Japanese language schools were "prompted by cultural and religious motives" [R. 556].

the Statute, in applying to parochial schools and the study of Latin as a foreign language in such schools, impinges upon the exercise of both freedom of expression and freedom of religion.

E.

The Statute Violates the Clear and Present Danger Rule.

The appellants concede that the clear and present danger rule applies to rights rooted in the First Amendment. (B. 76). Rights under the First Amendment are in issue herein. Hence, the clear and present danger rule applies.

Moreover, even if rights not strictly bottomed on the First Amendment were alone involved here, still the clear and present danger rule should be applied by this Court. For, at the minimum, important fundamental rights are in this case (*Farrington* case at p. 299). And this Court has already pointed the way toward the application of the "clear and present danger rule" to such statutes, by suggesting, if not definitively ruling, that such a Statute must find support in some "emergency" (in the *Meyer* case at p. 403). The phrase, "emergency," is part of a concept of the "clear and present" danger rule.

Clearly, no emergency exists in Hawaii from either organized foreign language schools or the teaching of foreign languages as broadly proscribed by the instant Statute, warranting the invasion provided by the Statute upon the rights of Chinese parents to educate their children in the language and culture of their mutual choice.

Whatever the "evil" from the foreign language schools in Hawaii, the educators of Hawaii and the witnesses for the Territory have uniformly conceded that that evil will be cured by lapse of time.

Supporting this conclusion is the Report of a Joint Committee of the United States Senate and House[38] reading:

> "It should be remembered that the privilege of naturalization is denied the alien-born Japanese except in certain special cases, or their reaction to the American environment of Hawaii might have more nearly paralleled that of European immigrant. Undoubtedly many would gladly become citizens of the United States, if permitted to do so. In any event, the alien group will pass off the stage within a short time, since they are all reaching old age almost simultaneously. As it is, the younger generation show the same attitude toward America that the first generation American-born European origin do; an appreciation of the material benefits received; a high con-

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[38]And with respect to one of the very Appellees herein, the Mun Lun Chinese School, Oren E. Long, Superintendent of Public Instruction and one of the key witnesses for the Territory, in the instant case, on the Twenty-fifth Anniversary of the Association issued the statement:

> "For 25 years it has played an important part in the development of Hawaii. As a result of its program many thousands of young citizens have become familiar with the language and culture of China, one of the greatest civilizations of history. It has also contributed to the spirit of understanding and good will which exists in Hawaii, to the social and economic efficiency of our young people and to their personal happiness and well being.
>
> "Because of our kindred interest in the youth of Hawaii, I wish on behalf of the public schools to congratulate the Mun Lun Chinese School on the observance of its 25th anniversary and to express the hope that it will continue for many years to serve the best interests of this community" [R. 402].

The Governor of the Islands, Joseph B. Poindexter, said of Hawaii's private schools, including the Mun Lun Chinese School as one of its private schools:

> "Hawaii is justly proud of its public and private schools. They determine the type of community life which we enjoy, and more than any other influence excepting that of the home they give us standards of citizenship and a law basis for social progress. Among these educational institutions the Mun Lun Chinese Schools has been outstanding" [R. 402].

ception of the freedom enjoyed; and an earnest endeavor to comply with the standards of the new culture.

"On the basis of behavior the American citizens of Japanese ancestry leave little to criticize and much to praise. As an orderly, law-abiding group their record is unexcelled. Their thrift and industry and willingness to cooperate with other groups are all well-marked traits. The evidence of schools and civic organizations, of church and political activities, all point to a desire on their part to share to the full the community responsibilities and to do so as fellow Americans, expressing a common loyalty to American ideals and institutions. Much is made of the foreign-language schools and press, but it should be realized that these agencies serve a real purpose in the adjustment of an immigrant group to new conditions. Many European immigrants have turned to the same means for establishing contact between the two generations. When these transitory vehicles have served their purpose they cease to exist, and there is no occasion to doubt that Hawaii will follow the same pattern already familiar to us on the mainland. The Americanization of the Japanese in Hawaii has perhaps made greater progress than it has with many immigrant groups of longer residence in America living in mainland communities. *Time will automatically solve many of the problems that seem to loom up as insurmountable today.* (Italics supplied.) The people of Hawaii are to be commended for the manner in which they have undertaken the task of maintaining the democratic principles of America and for having extended them to all its citizens. They are to be congratulated for the degree of success shown by all races in absorbing the spirit of American institutions. In this effort those of Japanese ancestry have taken their full share" [R. 551-552].

Accordingly, there is no justification for serious invasion of the liberties of the Chinese population of Hawaii to cope with an "evil" which time will cure.

Additionally, no claim has been made in behalf of the Territory or by any of its witnesses that the alleged retardation of the children of Hawaii (whether due to language schools or other causes) has or does affect their citizenship in, or qualifications for, citizenship in either Hawaii or the United States.

Thus, Oren E. Long, in his testimony before the Congressional Committee heretofore averred to [R. 554], asked himself the following question: "Do the citizens of Hawaii have a reasonable understanding of American institutions, and are they loyal to those institutions?" and thus answered it:

> "On the basis of my rather intimate understanding of the pupils in the schools, my contacts with the patrons of the schools in the parent-teacher association and my general knowledge of the larger community, I am convinced that . . . (this question) must be answered in the affirmative."

It would seem clear that, accordingly, the Statute is not directed at an "evil" as serious as that claimed in the *Farrington, Meyer* and companion cases, in the *Farrington* case the evil claimed was the teaching of disloyalty to the United States and of antagonism to America and things American. (Brief of Hawaii's Attorney General in the *Farrington* case at p. 134.)

In short, the reasons advanced for the legislation in the former language school cases before this Court was the safety of the state itself. To cope with so serious an evil, the state clearly might be warranted in taking action to protect itself action more stringent than in coping with

the claimed "evil" asserted herein—alleged "emotional conflict" and "retardation"—allegations and claims based on speculation and unsupported by demonstrable fact or accredited and reasonably uniform opinion by experts in the field of education.

Yet this Court found the reasons advanced in the former language schools to be constitutionally wanting; the reasons advanced for the present Statute are the more so.

F.

Section Four of the Statute Is Invalid as an Arbitrary and Unreasonable Exercise of the Police Power.

The Statute provides in section four that teachers must be certified by a board of examiners to be "reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher." This same type of provision was found to be unconstitutional in the *Farrington* case. There, the Act provided, amongst other things, that: "Before obtaining a permit to teach, the applicant must satisfy a territorial officer that he . . . knows how to read, write, and speak the English language." (*Farrington v. Tokushige*, 11 F. 2d 710, 714.)

Coupled with the other requirements and the general purpose of the Act, the Circuit Court, whose decision was affirmed on appeal, there concluded that the pupils must take a "course in Americanism—a course not required by any other class of citizens or students." The Court went on to say: "We feel quite safe in saying that, if such a system of regulations were enforced by one of our American commonwealths against an American college in which foreign languages are taught, it would shock the conscience of mankind" (p. 714).

Appellants attempt to distinguish the present statute on the grounds that under this statute the teacher must be well versed in not only English, but in his own language as well; that the regulatory features are somewhat different; and that the declared purpose of the statute is to provide for the welfare of the children and not general "Americanization." This last contention has been fully discussed above. It is sufficient here to note that the ultimate result intended of both statutes is the same, whatever the express terms of the more immediate objective of the present Statute.

As to the first contention, appellee school teacher, representing others similarly situated, must comply with all portions of the Act in order to teach school. The inclusion of the provision regarding his knowledge of the foreign language does not serve to mitigate the effect of his being required to also know the English language, which he alleges he does not know and pertaining to which he does not desire to submit to an examination. There is no legislative finding with respect to proficiency in the foreign language to support the necessity for this provision. The Act is designed to promote good English, not proficiency in the "foreign language." This provision then has no relationship to the purpose of the Statute. Were these schools connected with the public schools, or a substitution for public schools under the compulsory school system, then a requirement that the teachers have a degree of expertness in the fields taught would be reasonable, but that is not the case here. Here the claim is not that the foreign language is not well taught, but merely that its teaching interferes with the teaching in the public schools. This "balancing" requirement then can have no effect on the requirement of expertness in the English language found to be unconstitutional in the *Farrington* case.

The requirement with respect to expertness in the English language, whatever the purpose of the Statute, can no more be supported than in the *Farrington* case. There is no showing that a knowledge of English has any relationship to the ability to teach a foreign language. This teacher, we assume to be excellent in his own field of teaching children Chinese and well versed in all the Chinese classics and general culture of the language taught. As such, he cannot be denied the opportunity to earn a living by a regulation having no relation to that occupation, a useful, lawful, and highly skilled profession. Because there might be abuses in connection with this profession "is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way." (*Adams v. Tanner*, 244 U. S. 590, 594.)

This profession involving the right of freedom of speech, religion (and it should be again noted that Sunday schools are not exempt from this provision nor parochial schools of any kind), assembly, and thought, the fact that the regulatory features of the Act are somewhat different from the earlier Statute do not make them any less odious. As the area of the First Amendment is involved, the mere threat of censorship inherent in these licensing provisions coupled with the rest of the statutory provisions is sufficient to invalidate this section.

In addition, the requirement that parents must be certified by a board of examiners before they can by a regular and customary practice increase the knowledge of two or more of their children as a group in any field, is patently violative of the fundamental rights of custody and control which a parent may exercise over his child and of freedom of speech, assembly, religion and thought at the place where training in principles of liberty and freedom are most vital, the American home, still the most basic unit of

organization in our culture, whatever its customary language. The contention is made that the Statute will not be applied to parents, but this is of small comfort in view of its express language.

G.

Section Five of the Statute Is Invalid as an Arbitrary and Unreasonable Exercise of the Police Power.

Section five of the Statute provides for inspection of the "schools" by representatives of the department of public instruction of the Territory. The prior Act held unconstitutional in the *Farrington* case also provided for free visitation of foreign language schools by inspectors and agents of the department. (*Farrington v. Tokushige*, 11 F. 2d 710, 714.)

Appellants attempt to distinguish the present provision on similar grounds as section four (see above), that is: that the regulations do not go as far as the prior statute and the purpose is different. Neither of these contentions has validity in view of the facts and the law. Though some of the regulations in the prior statute were different from the ones in this statute, some going beyond these provisions (as with respect to textbooks), and others not as far (exemption of Sunday schools, Hawaiian language; application to only the first two grades, etc.) (p. 112), the inspection provisions were practically identical. Here, as with section four, the threat of censorship inherent in the provision is sufficient to invalidate the provision, the area of the First Amendment being involved. Also, whatever the purpose of the rest of the Statute, the purpose of the inspection provisions of the two statutes is the same, to allow public officials at any time to invade private assemblies to discover infractions of a law. This can no

more be sustained by a change of purpose than the prior provision.

Again, as with section four, the unreasonableness of the Statute as applied to professional teachers becomes tyranny and oppression in its harshest form when applied to parents, so harsh as to be unthinkable. On its face the Statute permits indiscriminate invasion of private homes at will by the inspecting authorities. The balancing of interests here more pointedly than with respect to any other portion of the Statute shows the patent invalidity of this Statute.

H.

The Statute Is Invalid as a Whole.

Though the inclusion of an express severability clause is entitled to due consideration, the effect is merely to create a presumption of separability.

Williams v. Standard Oil Co., 278 U. S. 235, 241-242.

Where basic civil liberties are involved, the presumption is the other way.

Thornhill v. Alabama, 310 U. S. 88;
Thomas v. Collins, 323 U. S. 516.

As in the case of *Thomas v. Collins*, there need not here be proof of an "abuse of power in the particular case. . . . (as) a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." Appellees must comply with the whole of the statute in order to engage in their profession of teaching young children. That they could without an undue infringement on their rights or those of their patrons comply with some insignificant portions of the Statute does not make the Statute as a whole any the less odious or oppressive.

In regard to the provisions of the Statute, cases involving similar statutes, though with detailed provisions, have resulted in the declaration of invalidity of the entire Statute.

Cf., the *Meyer*, *Bartels*, *Pierce* and *Farrington* cases.

I.

The Act Is Unreasonable in That It Sweeps Within Its Ambit to Persons Other Than Those for Whose Welfare It Was Expressly Enacted.

For public officials to prohibit the acquisition of knowledge in any field by any person is, in light of our fundamental constitutional guarantees of liberty and freedom to the individual and academic freedom, a very serious matter and only the most urgent demands of public necessity should warrant such an interference with this right to acquire knowledge. When the citizen in his early formative years is concerned, such a prohibition should be examined, as already heretofore urged, with particularly careful scrutiny.

The legislature has made findings that "children of average intelligence in their early and formative years" are affected by the evil sought to be remedied by the Statute, and that the evil may be remedied by prohibiting formalized acquisition of knowledge in this field by children who have not completed the fourth grade or attained the age of nine or such child as is earlier able to "speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and reading"; and the acquisition of knowledge in this field thereafter regulated through the eighth grade or the age of fifteen years. The Statute omits any provision for persons who are of above or below average intelligence or for

children who may be able to pass the test mentioned in the findings or for those who reach the age of nine. By virtue of these omissions, the legislature has enacted a statute which patently is not designed to meet the evil legislated against, nor is the Statute designed to further its avowed purpose, to legislate to promote the best interest, health and welfare of children of tender age. Contentions made by appellants (Appellants' Br. pp. 80-89) that the legislative findings and intent support the application of the act to all children are refuted by the express language of those findings and the provisions of the Statute.

First, express recognition of an exception in the case where a child may pass certain tests earlier than the completion of the fourth grade shows that the legislature did not intend "average" to be interpreted to include all children, or even children generally.

Second, by providing in Section 3 that only those may continue the study of foreign languages who attain on certain tests scores "not lower than normal for his grade," it seems evident that the legislature intended "average" or even "normal" to be used in the sense of a mean and not in the broader sense advanced by appellants.

Third, by defining "school" in Section 2(a) to include only two or more in a group, the legislature showed further evidence that it did not intend this act to apply to all children; for one child, taught alone did not apparently suffer the retardation or emotional disturbance of those taught together.

Fourth, by the findings that Oriental languages caused the chief trouble in this, considering the circumstances in Hawaii, because of a divergent population, does not support legislation with respect to all children, whether their native tongue be English or otherwise.

Whether the broad interpretation of the findings and intent of the legislature urged by the appellants or the construction placed upon these by the District Court be used [R. 85], the fact remains that the findings do not support the application of the Act to all children and the combination of those who should have been excluded with those who might properly be included, under the findings, within its terms, renders the entire Statute invalid.

This Statute discriminates against not only those above average and their teachers and parents, but those who are below average in their attempt to find future occupations. For those below average who cannot pass these tests, considering the many children who support themselves in their early 'teens [R. 289, 360, 361, 467-468, 480, 492] and also considering the inadvisability of continued education, the spark of intelligence of early childhood is wasted without any opportunity accorded them to accommodate themselves under the direction of their parents and special teachers in a multilingual community.

The discrimination against those who cannot afford to hire private tutors for each of their children is also evident, besides that against the native English-speaking children who in a multilingual community are prohibited from learning languages which may be useful in assimilation or religious training or general cultural training. These discriminations are sufficient to render a state Statute invalid. No less so for a territorial statute. (*Hurd v. Hodge*, 334 U. S. 24, 35-36.)

Where basic freedoms are involved, the legislature must use particular care in drafting legislation to cover the narrow evil sought to be remedied. (*Thornhill v. Alabama*, 310 U. S. 88.)

II.

The United States District Court Below Had Jurisdiction and Exercised It Properly (Appellants' Points I-IV).[a]

Preliminary Statement.

Appellees posited jurisdiction of the United States District Court on 28 U. S. C. 41(1), 28 U. S. C. 41(14), 8 U. S. C. 43 and 28 U. S. C. 400[b] [R. 57]. Of course, if that court had jurisdiction under any of those sections, it had jurisdiction to pass upon the constitutional questions involved. Appellants have conceded that the District Court did have jurisdiction (B. 30, 31).[c]

Appellants have placed incorrect emphasis upon the so-called doctrine of abstention. The rule to be followed was declared by Justice Frankfurter speaking for this court in *Lane v. Wilson*, 307 U. S. 268, 274:

> "Barring only exceptional circumstances, see *e. g., Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, or explicit statutory requirements, *e. g.*, 48 Stat. 775; 50 Stat. 738; 28 U. S. C. Sec. 41(1), resort to a federal court may be had without first exhausting the judicial remedies of state courts."

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[a]Originally appellees had grave doubts about the right of appellants to appeal directly to this Court. Upon further consideration, however, appellees are convinced that appellants do have the right. Accordingly appellees accept the position taken by appellants in their Point I. This section of appellees' brief, therefore, will be directed toward Points II, III and IV with which appellees do take issue.

[b]Appellees will refer to the old section numbers rather than the new ones since at the time of the hearings and decision in this case the old numbers were in effect.

[c]References to Appellants' Brief will be by the letter "B" followed by the page number, *e.g.* (B. 1).

Appellees, to vindicate their grievances do "not have to pursue whatever remedy may have been open to (them) in the state courts." (307 U. S. 268, 274.)

Therefore, unless appellants showed exceptional circumstances or an explicit statutory requirement, the District Court below properly granted the relief. Nowhere in the record nor in appellants' brief is there a showing of any exceptional circumstances as to why the District Court should not have acted, nor is there any explicit statute requiring that the District Court not have acted. Unless such a showing is initially made, the question of the District Court abstaining simply does not arise.

Indeed it might well be, in a case arising under 8 U. S. C. 43 (and its jurisdictional base—28 U. S. C. 41(14)), that the complainant is entitled to relief from the District Court without regard to the question of abstention.[a] Otherwise, the Civil Rights Act would not be given the liberal effect due it and the fundamental rights sought to be protected thereunder will be weighted down in a procedural bog. (*Cf.*, "To Secure These Rights," Report of the President's Committee on Civil Rights, U. S. Govt. Printing Office, 1947, pp. 112, 132.)

In any event, it is appellees' position that there is no question of procedure before this court, and that the case should forthwith be decided on the merits because the doctrine of *Hague v. Wilson* applies.

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[a] Appellants concede, and appellees agree, that the District Court had jurisdiction under 28 U. S. C. 41 (14). [B. 30, 31, and Appendix III thereto.] This is as true of the appellee school teacher, who is before this court and whose right to earn a living is a civil right (*Takahashi v. Fish & Game Commission*, 334 U. S. 410) as it is of the parents as to whose civil rights appellants concede the District Court had jurisdiction (B. 30, 31).

Out of an abundance of caution, however, appellees will proceed to answer the points raised by appellants' brief and will discuss them in the order there raised.

A. JURISDICTION OF THE UNITED STATES DISTRICT COURT WAS ESTABLISHED (Appellants' Point II).

Appellants and appellees are in agreement that as to the appellee school teacher, Leong Nget Cho, jurisdiction was established (B. 30) and that 28 U. S. C. 41(14) does apply to the Territory of Hawaii and that therefore the lower court erred in dismissing the action as to the two parents, Wah Chan Thom and Wilfred Chong, because of failure to establish the $3,000.00 jurisdictional amount (B. 31).

The parties are not in agreement, however, on the question as to whether the lower court had jurisdiction over the appellee school corporations. Our discussion will be divided into two parts: first, that the corporation appellees have established the $3,000.00 jurisdictional minimum; and second, that 28 U. S. C. 41(14) applies to corporations so that, assuming that section does apply to the Territory of Hawaii, no $3,000.00 minimum need be shown.

(1) The Jurisdictional Amount Was Shown (B. 31-33).

The lower court's finding that the corporation had established the jurisdictional amount is amply supported by the evidence [R. 111]. A summary of the pertinent evidence on this point clearly shows that the enforcement of the statute in question will:

1. "reduce the attendance (at the appellee schools by) one-half" [R. 19, 469];

2. "reduce the tuition fees to about one-half" [R. 19];

3. make it "impossible for (the appellee) schools to conduct their business and (they) will be compelled to close their doors" [R. 19];
4. "reduce the normal number of students to such a small number that the inevitable practical result will be the destruction of (appellees') primary schools" [R. 19].

Further that:

1. the provisions of the statute in question "are so drastic that the parents of children will be afraid to pay tuition fees and other persons will be afraid to contribute to the funds of said schools" [R. 19, 476, 486];
2. the average attendance at the appellee Mun Lun Chinese School prior to the closing thereof was 1,100, "and the annual fee received for each student amounted to about $18.00 per annum making a total of $19,800.00 per annum" [R. 52, 465, 485];
3. "from the 1st grade to the 4th grade inclusive, the average attendance (at Mun Lun Chinese School as of time of closing) was about 300 students paying an annual tuition fees of $4,500.00 per annum, or for the 4-year period making a loss of $18,000.00" [R. 53, 465];
4. the elimination of the high school at Mun Lo which taught about 200 students amounts to a loss in fees annually of $4,200.00 [R. 53, 465];
5. "average attendance (at the appellee Chung Shan Chinese School) prior to the time of its closing on December 7, 1941 . . . was 850, and the annual fee received for each student amounts to about $18.00 per annum making a total of $15,300.00 per annum . . . from the 1st grade to the 4th grade inclusive, the average attendance was about 300

students paying an annual tuition fees of $4,500.00 per annum, or for the four-year period making a loss of $18,000.00" [R. 53, 465];

6. the elimination of the high school course at Chung Shan would mean a loss of the annual fees of about 100 students or $2,400.00 per annum [R. 54, 465];

7. "the average attendance (at appellee Dai Kung Chinese School prior to closing) was 100 and the annual fee received for each student amounted to about $18.00 per annum making a total of $1,800.00 per annum, or for the 4-year period making a loss of $7,200.00" [R. 54, 465, 484];

8. the loss to the Muy Lun school from closing would also jeopardize the value of its real property and equipment which amounts to $105,000.00 and of its annual donations of $5,000.00 [R. 53, 465, 466, 474, 484];

9. the loss to the Chung Shan School's property and equipment resulting from the closing amounts to $105,000.00 and annual donation loss of $4,000.00 [R. 54, 465, 466, 474];

10. the loss to the Dai Kung school in property and equipment resulting from the closing of the schools amounts to $10,500.00 and annual donations loss of $500.00 [R. 54, 465, 466, 474, 484, 485];

11. All children between the ages of five and six are definitely prohibited from atfending the schools [R. 456];

12. Students who would first have to start learning the Chinese language—*i. e.*, go to the first grade at the appellee corporations' schools would not go to the schools [R. 467, 468];

13. Because of the statute there would be fewer children attending the Chinese language schools who are in

the 5th to the 8th grades in public school because the experience of the schools has been that the students in those grades in the public schools drop out of going to the Chinese language schools [R. 469];

14. If the statute is applied, only a few—not more than five—would go to the Chung Shan School's high school [R. 469];

15. If the statute is applied, the Chung Shan School would have only 200 students, all in the low grades [R. 470];

16. If the statute is not applied, the Chung Shan School would have at least 400 students [R. 471];

17. If the statute is applied, the appellee school corporations will be unable to make contracts with Chinese language teachers because those teachers would be unable to pass the English language test [R. 477, 493, 494];

18. If the statute is applied, parents are fearful of sending their children to the schools, but would send them if the statute is not in operation [R. 486, 487, 489, 490, 491];

In the light of all this evidence, it is clear that the appellee corporations showed that $3,000.00 is involved. Indeed the showing is overwhelming that far more than the $3,000.00 is at issue. To illustrate by way of one example: average attendance at one of the schools, Mun Lun, prior to closing brought in a revenue to the school of $19,800.00 [R. 52, 465, 485]. The proof is that if the statute is enforced, attendance will be cut in half [R. 19, 469]. It is a matter of simple arithmetic to see that one-half of $19,800.00 is over $3,000.00. And this is but for one year. Certainly, when it is considered that the disability caused by the statute will extend over many years,

it is clear without question that the $3,000.00 jurisdictional requirement has been shown.

McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, cited by appellants is not in disaccord. The principle of that case is:

> "The object or right to be protected against unconstitutional interference is the right to be free of that (the statutory) regulation. *The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondents' bill as to the extent or value of its business throw no light upon that subject. *They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve*" (at page 181, italics added.)

Appellees here have shown precisely what loss would follow the enforcement of the statute; they have also shown precisely what curtailment of business and consequent loss the enforcement of the statute would involve.

To take another example: the Chung Shan School, if allowed to reopen without the enforcement of the statute, would have an attendance of 400 [R. 471]. With an average tuition fee of $18.00 per student [R. 465], the revenue from tuition alone would be $7,200.00. The enforcement of the statute would mean that only 200 children would come to the school [R. 470]. Simple computation demonstrates that income from the tuition of these students would reduce appellee's income by $3,600.00 for but one year. Here again is ample proof that the amount in controversy exceeds the $3,000.00 requirement.

In *Pierce v. Society of Sisters*, 268 U. S. 510, 531, 532, the plaintiffs were corporations, as are two of the plain-

tiffs herein. What the Court said of the plaintiff corporation in the *Pierce* case applies to the instant case:

> "And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.
>
> "The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined."

And in *Farrington v. Tokushige*, 273 U. S. 284, 298, this Court said:

> "Enforcement of the act probably would destroy most, if not all, of them (the foreign language schools) and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful."

Jurisdiction of the court below in the case at bar, just as in the cases above quoted, is thus amply shown.

Appellants speak as though in order for the appellee language schools to show damage they must show that the first four grades will be entirely eliminated (B. 32). It is clear that complete destruction is not necessary. All that need be shown is substantial loss (*cf.* the *McNutt* case, *supra*). If, because of the enforcement of the statute, students above the fourth grade in the public schools will not begin in the first grade in the language schools either because of shame or the burden of work [R. 467, 468], a sufficient showing of loss is made—particularly, since the number of students in the first four grades constitutes one-fourth of the attendance [R. 42].

Indeed the showing has been made, if that be necessary, that not only the first four grades would be eliminated, but the schools themselves would be destroyed [R. 477, 482, 493].

Looking at the picture from the other side of the schooling cycle,—that is from the high school side, here again there has been ample demonstration of more than a $3,000.00 loss. In Hawaii, it is quite normal and usual for the young people to begin making their own living at the age of 15 [R. 80, 288, 360, 361]. Thus, if their Chinese language schooling is postponed until they have passed the fourth grade in public school, it means that they commence their Chinese language learning at age 10, in the first grade of the Chinese language school. They would go only through the sixth grade in language learning, and then go out to work. Accordingly the upper, or high school, classes of the schools would be effectually eliminated. The loss so occasioned at the Mun Lo School from loss of tuition fees amounts to $4,200.00 annually at that school [R. 53, 465]; at the Chun San School this loss is $2,400.00 per annum [R. 54, 465].

Appellants argue that in order to show a loss because of the inability to obtain teachers, respondents would have to show that they could obtain *no* teachers (B. 33). Here again they speak in absolutes. It is submitted that no such absolute showing need be made. Utter destruction is not required. In the *Farrington* case, 273 U. S. 284, similar problems and difficulties in obtaining teachers were held sufficient by this Court. Appellees have shown with sufficient certainty their inability to obtain teachers who can qualify under the law, and still be competent to teach the Chinese language [R. 493, 482, 197];

And in any event (though there is no reason for the Court to reach this point); it having been established that appellee Leong Nget Cho suffered the jurisdictional loss [R. 101, B. 30], the District Court had jurisdiction to determine the constitutionality of the statute in issue, as this Court did in the *Pierce* and *Farrington* cases, *supra*.

(2) 28 U. S. C. 41(14) Applies to Corporations (B. 30).

Appellants' citation of *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 514 (B. 30), in support of their claim that the appellee corporations are entitled to no relief under 28 U. S. C. Sec. 41(14) is inapposite. In the *Hague* case, this Court ruled merely that "natural persons, and they alone, are entitled to the privileges and immunities which §1 of the Fourteenth Amendment secures for 'citizens of the United States.'" 28 U. S. C. 41(14) is broader, however, and gives protection to "any *person* to redress the deprivation under color of any law . . . of any *right*, privilege, or immunity, secured by the Constitution of the United States." (Italics added.) Thus the section gives protection to a "person" to redress a "right." In the *Hague* case this Court confined its consideration to the question as to whether a "privilege or immunity of a citizen of the United States" (p. 512) was being infringed upon. The question as to whether a "right" of a "*person*" was infringed, was not considered.

While it is clear that a corporation is not a "citizen" within the privilege and immunities clause (*Hague* case, p. 514), it is equally manifest that a corporation *is* a "person" entitled to the protection of its "rights" under the

Constitution. Thus, in *Covington and Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578, 592, this Court said:

> "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."

This rule has never been departed from. See, for example, *Pierce v. Society of Sisters*, 268 U. S. 510, and the many cases cited at U. S. C. A. Constitution, Part 3, page 101.

Indeed the very point urged herein by appellees, has been heretofore sustained. (*Northwestern Fertilizing Co. v. Hyde Park*, 18 Fed. Cas. No. 10,336; *Anglo-American Provision Co. v. Davis Provision Co.*, 105 Fed. 536.)

While most of the cases which have decided that a corporation is a person entitled to this protection have dealt with the property subdivision of the due process clause of the 14th Amendment, the same rule is applicable to the property subdivision of the due process clause of the 5th Amendment. (*Cf., Farrington v. Tokushige*, 273 U. S. 284, 299; *County of San Mateo v. Southern Pacific Railroad Company* [the Railroad Tax Cases], 13 Fed. 722, 746, App. Dis. 113 U. S. 138.)

Accordingly it follows that that part of 28 U. S. C. 41(14) which refers to "persons" and "rights" applies to corporations although that part of the section which refers to "citizens" and "privileges and immunities" does not. To hold otherwise would be to write out of the statute the words "person" and "right." This the Court will not do. (*McDonald v. Thompson*, 305 U. S. 263, 266.)

B. APPELLEES HAVE STATED A CAUSE OF ACTION FOR EQUITABLE RELIEF. (Appellants' Point III.)

Pierce v. Society of Sisters, 268 U. S. 510, and *Farrington v. Tokushige*, 273 U. S. 284, have settled, it would seem, the precise question. In both those cases the argument was made that the United States District Court should not have issued the injunction because no cause of action in equity had been shown. And in both cases, on facts substantially identical to those at bar, this Court found ample grounds for equitable relief.

In the *Pierce* case, the trial was by a three-judge court, as in the instant case. But in that case the suit for injunction in the United States District Court was brought some time before the state statute was even to go into effect. Said this Court (at pp. 535, 536 of 268 U. S.):

> "Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, *supra*, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. (Citing cases.)
>
> "The suits were not premature. The injury to appellees was present and very real,—not a mere possibility in the remote future. If no relief had been

possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity."

Both the above cases are so close to the case at bar that they furnish sufficient authority for the holding by the lower court that a cause of action for injunctive relief was presented and in denying the motion to dismiss. If the law be that whether a federal court will issue an injunction to restrain the enforcement of a territorial statute depends upon the facts in the individual case, it is submitted that the factual basis in the instant case, just as it was in the *Pierce* and *Farrington* cases, is sufficient. There is surely no good reason for this Court holding that causes of action for injunction were present in the *Pierce* and *Farrington* cases and not in the instant case. There is no basis for distinction, between the *Pierce* and the *Farrington* cases, and the instant case; the causes of action alleged are identical.

Moreover, while perhaps it was inevitable because of the nature of the problem, appellants' arguments in their Points III and IV overlap. There are two problems: (1) whether a cause of action for equitable relief is stated (discussed above) and (2) whether, if such a cause of action is stated, a United States District Court should exercise that power in adjudging a territorial statute to be unconstitutional. Appellees will discuss this second point below under Point III.

Because there are the two distinct problems involved, it should be initially understood that the question as to whether a cause of action for relief in equity has been stated is to be determined by the relief that can be granted

in the United States District Court and not by the relief that can be granted by the Territorial courts. (*American Federation of Labor v. Watson*, 327 U. S. 582, 594, and *Di Giovanni v. Camden Fire Ins. Assn.*, 296 U. S. 64, 69.) This distinction, which appellants have failed to note, is well illustrated in the *Watson* case where this Court found grounds for equitable relief but declined to exercise it because it found present in that case considerations deemed sufficient to apply a policy of abstention. The fact that there is a method of challenging the statute in the Territorial courts (B. 33, 39) has nothing to do with the question as to whether a cause of action for equitable relief is stated. "If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford." (*Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 69.)

Appellees submit that they have amply shown their right to equitable relief in accordance with the cases.

Terrace v. Thompson, 263 U. S. 197, is particularly *appropos* here; in that case, also, the Attorney General of the state argued that the plaintiff below had no right in equity to enjoin enforcement of the Washington Alien Land Law because the constitutionality of that act could be tested by the state bringing an escheat action following the plaintiff's making the lease. Said this Court (p. 215):

> ". . . And assuming, as suggested by the attorney general, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consumation of the pro-

posed lease. The threatened enforcement of the law deters them."

So in the instant case.

There is no conceivable way under the statute in the case at bar, for the corporation appellees to be reimbursed for the expense to which they will have to go to set the schools in operation pending the institution by appellants of an action in the Territorial courts. Nor, as the *Terrace* case points out, should the corporation appellees be required to take this step in order to have the aid of equity. As there decided, the *other* remedy, which the Attorney General would *always* have the complaining litigant pursue, "must be as complete, practical and efficient as that which equity could afford." (263 U. S. 197, 214.)

And insofar as the school teacher appellee is concerned, the Territorial remedy suggested by the appellants (B. 36) has absolutely no application at all to him. His is the right to earn a living by teaching the Chinese language. He cannot open a school. If the corporation appellees are unable or unwilling, because of the large expense and difficulities involved, to operate under the statute, the school teacher does not even have the method open to him which appellants suggest he ought to have taken in the first place. To decline him his remedy in equity would truly leave him remediless.

Other cases which support the instant case on the equity question are: *Toomer v. Witsell*, 334 U. S. 385; *Truax v. Raich*, 239 U. S. 33; *Pierce v. Society of Sisters*, 268 U. S. 510; *American Federation of Labor v. Watson*, 327 U. S. 582, and *Farrington v. Tokushige*, 273 U. S. 284. Indeed the *Pierce* and *Farrington* cases would seem to have definitely established that precisely in the type of case at bar is equitable relief proper.

C. APPELLEES HAVE STATED A CAUSE OF ACTION FOR DECLARATORY REIEF (B. 38, 39).

The argument that because appellees sought a preliminary injunction, they thereby showed that there was not too great a risk of expense and therefore they are not entitled to declaratory relief under 28 U. S. C. 400 (B. 39) is without substance.

It is *not* the law that in order for a party to be entitled to declaratory relief, he must first show that otherwise he will be subject to great hazard. There need only be an adversary proceeding involving the protection "of rights arising under the Constitution and laws of the United States." (*Nashville, Chatanooga and St. Louis Ry. v. Wallace*, 288 U. S. 249, 264.)

Contrary to the implication made by appellants, in order to be afforded declaratory relief, one need not bring himself within the usual equitable doctrines such as irreparable injury (*United Public Workers v. Mitchell*, 330 U. S. 75, 93), or inadequate remedy at law. (*Columbian Nat. Life Ins. Co. v. Foulke*, 89 F. 2d 261, 263 (C. C. A. 8, 1937).) Neither the statute nor the cases so hold. Indeed, Rule 57 of the Federal Rules of Civil Procedure specifically provides that "the existence of another adequate remedy does not preclude a judgment for declaratory relief . . . ."

Appellants' argument "that appellees might readily have opened their schools and operated them the way they wanted to in defiance of the statute, pending adjudication of its validity in an enforcement proceeding in the territorial court . . ." (B. 39) has been repeatedly rejected by the courts. The Declaratory Judgment Act is intended to save a litigant from that very risk and hardship. (*Cf. Columbian Nat. Life Ins. Co. v. Foulke*, 89 F. 2d 261, 263 (C. C. A. 8, 1937).)

Nor does appellants' argument that in order to have declaratory relief the plaintiff must show some great risk (B. 39) have merit. In *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 241, this Court pointed out that:

> ". . . it is not essential to the exercise of the judicial power (through declaratory relief) that an injunction be sought, allegations that irreparable injury is threatened are not required."

The purpose of the declaratory relief statute is to declare rights. Accordingly, the moving party in such an action is often the party against whom, just as in the case at bar, proceedings would normally be instituted. So, in *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270, 273, this Court held:

> "It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case."

Declaratory relief is precisely designed for just such a case as the present one. It is for the purpose of laying at rest uncertainties; and to obviate the necessity for a party to incur expenses or damages or possible suit in order that he may know his legal rights. See *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F. 2d 852, 854 (C. C. A. 7, 1937), cert. den. 298 U. S. 680, and *Gully v. Interstate Natural Gas Co.*, 82 F. 2d 145, 149 (C. C. A. 5, 1936).

That declaratory relief is proper to challenge the constitutionality of a statute can, of course, no longer be gain-

said (*United Public Workers v. Mitchell*, 330 U. S. 75, 93.)

In words written as though the instant litigation were in mind, Professor Borchard says in his work on Declaratory Judgments[1]:

(Page 766) "Nor, where constitutionality may be raised, is there more necessity for simplicity of adjudication for the individual and the community who must know at the earliest opportunity whether they are living under constitutional or unconstitutional laws, for delay may bring uncertainty and difficulties of all kinds."

(Page 784) "Legislation dealing with civil liberty, such as freedom of worship and *freedom in establishing or attending schools*, has been tested in this way." (Italics added.)

(Page 786) "All that the plaintiff would be required to show, as in the *Ambler* (*Euclid v. Ambler Realty Co.*, 272 U. S. 365), *Pierce* (*Pierce v. Society of Sisters*, 268 U. S. 510), and other cases, is that the enactment of the statute creates a threat, jeopardy or burden which impairs materially the plaintiff's business."

Hence, it is clear that the amended complaint and the evidence adduced at the trial, give ample ground to support a declaratory judgment.

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[1]Borchard, "Declaratory Relief" (Banks-Baldwin Law Publishing Co., 1941). See also pages 280-288

D. THE UNITED STATES DISTRICT COURT PROPERLY EXERCISED JURISDICTION IN THIS CASE (Appellant's Point IV).

(1) Appellants by Neglecting to Take Advantage of the Right Given Them by 28 U. S. C. 380 to Obtain a Decision by the Territorial Court Cannot Now Complain Because of the Lack of Such a Decision.

After arguing in their Point I that Judicial Code Section 266 (former 28 U. S. C. 380, now Title 28 U. S. C. 1253, 2101, 2281 and 2284) is applicable to Hawaii, appellants in their Point IV proceed to utterly ignore the statute's existence and to emasculate its import (B. 48).

That section itself sets up the procedure whereby appellants themselves could have obviated the situation which they now argue is a ground for this Court to send the case back on a procedural point, and thus avoid a decision on the merits from this Court. The section states:

> "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

Thus if appellants had been in reality as concerned about first obtaining a ruling by the Territorial courts, either as to the constitutionality or an interpretation of the Territorial act challenged herein, all they need have done was file a suit in the Territorial courts and the very

proceedings of which they now complain would have been automatically stopped or abated. Section 266 goes so far as to provide that if such a suit is started in the Territorial courts and is not prosecuted in good faith, the stay in the federal 3-judge court will be vacated and the case will proceed in the United States District Court. The case at bar, indeed, is stronger. Here appellants did not even start a proceeding. Clearly, therefore, the United States District Court should, as it did, decide the case. Any other ruling would render nugatory the clear meaning of Section 266.

The section was an open invitation to the appellants to halt the proceedings in the District Court, if they so desired. They should not now be permitted to take advantage of their own inactivity to defeat a decision on the merits. See *Modern Woodmen of America v. Casados*, 17 Fed. Supp. 763 (D. C. N. M. 1937), and *Department of Agriculture & Markets v. Laux*, 223 Wisc. 287, 270 N. W. 548.

In the latter case it was squarely held that the defendants in the federal action under Section 266 could sue in the state court, obtain a stay in the federal court, and obtain a declaratory judgment on the constitutionality. This was precisely the action that was open to appellants herein.[5] Appellants should not be permitted to blow both hot and cold: sit tight while the trial is going on in the federal court when all the time they had it within their power to stay the proceedings and then, after having lost, say that the federal court should not have acted at all.

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[5] Sections 9971-9976, Revised Law of Hawaii, 1945, as amended by Act 74, Series D-172, Laws of the Territory of Hawaii, Regular Session of 1945.

The statute is a highly salutory and remedial one. It is not one through which parties aggrieved by an unconstitutional state or territorial statute can be kept dangling at the end of a string.

(2) The Doctrine of Deference Constitutes No Barrier to the Action Taken by the District Court (B. 40-42).

It is respectfully suggested that appellants have misapplied the doctrine of deference to this case. The very cases cited by appellants (B. 41) establish that that principle is nothing more than the principle of *Erie Railway v. Tompkins* applied to the Territories. Thus this Court said in *De Castro v. Board of Commissioners*, 322 U. S. 451, 459 (B. 41):

> "Once understood what deference is to be paid, the problem is comparable to that presented when, upon appeals from federal district courts sitting in the states, the federal appellate courts are required to follow state law under the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487."

Thus, whereas in regard to states, there is a specific statutory rule (28 U. S. C. 725, new Title 28, U. S. C., Section 1652) to which *Erie Railway v. Tompkins* finally gave its true effect, this Court has quite properly established the same rule in regard to the Territories; particularly where, as in the *De Castro* case, the court was dealing with matters of "purely local concern" (322 U. S. 451, 457).

Where there is a state construction of a state statute, the Federal Courts, pursuant to *Erie Railway v. Tompkins*, must give "deference" just as they must, pursuant

to *De Castro v. Board of Commissioners*, to a territorial construction of a territorial statute. But where there is no such construction, neither the doctrines of *Erie Railway v. Tompkins* nor of deference require the United States District Court to "await state court construction before passing on constitutionality" (B. 40). In such a case the Federal Courts must, in the nature of things, arrive at their own construction just as they did in *Pierce v. Society of Sisters*, 268 U. S. 510, to which appellants take exception (B. 45), and just as this Court is doing to this very day. (See *King v. United Commercial Travelers*, 333 U. S. 153; *Fidelity Union Trust Co. v. Field*, 311 U. S. 169; *Meredith v. City of Winter Haven*, 320 U. S. 228; *Markham v. Allen*, 326 U. S. 490.)

The other case cited by appellants (B. 41) *United States v. Fullard-Leo*; 331 U. S. 256) clearly supports appellees. In that case, after referring to the local deference—*Erie Railway v. Tompkins*—rule of the *De Castro* case, this Court pointed out that where the court is "dealing . . . with a problem of Federal law . . . the federal courts construe the law for themselves" (331 U. S. 256, 269).

Thus it is seen that there is no occasion to apply the deference principle here because the Court is dealing, as in the *Fullard-Leo* case, with a problem of Federal law. However, if it be deemed that the case involves a problem of purely local concern, which appellees submit it does not, the lower court properly applied its own construction in accordance with the principle of *King v. United Commercial Travelers*, *Fidelity Union Trust Co. v. Field* and *Pierce v. Society of Sisters*, *supra*.

(3) The Doctrine of Abstention Does Not Apply as Between the United States District Court in Hawaii and the Territorial Courts With the Same Force That It May Apply as Between the United States District Courts and the State Courts (B. 40).

The same considerations of judicial policy which might be urged against a United States District Court enjoining the enforcement of a State statute do not apply to a statute of the Territory of Hawaii.

With regard to a State statute, considerations greater than comity apply. It is indeed a question of giving effect and preserving the Federal or "dual system of government" (*Watson v. Buck*, 313 U. S. 387, 401). There is no such fundamental relationship between a United States District Court and Territorial statutes or Territorial courts.

The Territorial courts are in effect but part of the Federal system of courts. Thus an appeal from the highest court in Hawaii lies with the Court of Appeals for the Ninth Circuit and not with the United States Supreme Court as is the case of the highest state courts (28 U. S. C. 225(a), now 28 U. S. C. 1293 and 1294).[h]

More important, however, is the fact that the powers exercised by the Territorial government and its courts all

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[h]Appellants in this very case have indicated that they are not too concerned about a decision by that highest court to which an appeal from the Territorial Courts may be taken. Witness their Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit Before Judgment (*Stainback v. Po*, No. 474, Oct. Term 1948 in this Court), nothing is to be gained, therefore, by sending the case back to go through the Territorial Courts and back to the Court of Appeals for the Ninth Circuit, a decision by which, apparently, is not too important to appellants.

stem from the powers delegated thereto by Congress. Therefore the constitutional limitations are measured by the power given Congress by the Constitution rather than by the power reserved to the States by the Constitution. There is no denying that the entire government of the territory, including the courts themselves, are creatures of Congress and subject to its control. See Organic Act (Act of April 30, 1900, 31 Stat. 141, 48 U. S. C. 491 *et seq.*, particularly 631-636).

Moreover, the very territorial judges, before whom appellants would now try this case, are appointed by the President of the United States by and with the consent of the United States Senate (48 U. S. C. 633); and the very same President and Senate appoint the United States District Judges in precisely the same manner (48 U. S. C. 643). There are, therefore, not the same reasons for a United States District Judge abstaining in favor of Territorial Judges as there might be in favor of State Judges. For the latter are elected by the people of the States or appointed by the Governors thereof.[hh]

Because of this all encompassing Congressional—Federal—control, the argument that the Federal Courts might first desire state interpretation is not nearly so pressing, if indeed at all applicable. This is so because the interpretation by any court in Hawaii would be Federal interpretation.

Accordingly it follows that there is no compelling reason why the plaintiffs must be first required to go to a Territorial Court as appellants would now have them do.

[hh] E. g., Cal. Const. Art. VI, Sec. 26.

(4) The Doctrine of Abstention Is Not Applicable in This Case.

Though appellees have spent considerable time in pointing out that appellants should not now be permitted to cause the case to go back again along the long judicial path, appellees submit that in any event the case at bar presents that type of case wherein this Court should act.

Appellees again emphasize (see Preliminary Statement, *supra*, p. 46) that, jurisdiction in the District Court having been established, the correct rule is not the negative one contended for by appellants (B. 42) that the Court will not act unless there is some special reason for it so to do. The rule is positive that the Court *will* act *unless* there are special circumstances or explicit statutory prohibitions as to why it should not. (See *Lane v. Wilson*, 307 U. S. 268, 274; *Toomer v. Witsell*, 334 U. S. 385, footnote 15; and *cf., Markham v. Allen*, 326 U. S. 490; *Meredith v. City of Winter Haven*, 320 U. S. 228.) Otherwise, the many cases wherein federal court action against state statutes has been approved have been incorrectly decided. We submit that they were not.

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[1] *E.g., inter alia: Toomer v. Witsell*, 334 U. S. 385; *Public Utilities Com. v. United Fuel Gas Co.*, 317 U. S. 456; *Hines v. Davidowitz*, 312 U. S. 52; *W. Va. State Bd. of Education v. Barnette*, 319 U. S. 624; *Hague v. Committee for Industrial Organization*, 307 U. S. 496; *Home Tel. & Tel. v. Los Angeles*, 227 U. S. 278; *Pierce v. Society of Sisters*, 268 U. S. 510; *Farrington v. Tokushige*, 273 U. S. 284; *Terrace v. Thompson*, 263 U. S. 197; *Tyson & Bro. v. Banton*, 273 U. S. 418; *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210; *Truax v. Raich*, 239 U. S. 33; *Sterling v. Constantin*, 287 U. S. 378, and *cf. Meredith v. City of Winter Haven*, 320 U. S. 228; *Polk Co. v. Glover*, 305 U. S. 5; *Gibbs v. Buck*, 307 U. S. 66; *Buck v. Gallagher*, 307 U. S. 95; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; *Ex parte Royall*, 117 U. S. 241; *Ex parte Young*, 209 U. S. 123; *Markham v. Allen*, 326 U. S. 490, 495: "The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner."

But in any event the instant case falls without the cases relied on by appellants (analyzed below) and falls within an entirely different line of cases. See footnote "i," *supra*.

In the first place the statute requires no interpretation. There is no ambiguity, it is clear on its face. Section 3 [R. 12, B. 100] clearly provides that no child shall be taught a foreign language in any school if he has not "passed the fourth grade in public school or its equivalent." That language certainly does not permit of any construction or interpretation. It very clearly states that if a child is in the 1st, 2nd, 3rd or 4th grades, he cannot go to a school and be taught a foreign language. No twisting or turning by the Territorial Court could change that meaning. The statute is admirable in its simplicity and clarity.

Nor does Section 4 [R. 13, B. 101] require any interpretation insofar as the appellee school teacher is concerned. There is no controversy but that Leong Nget Cho is a competent Chinese language teacher and that he is not reasonably well versed in the usage and idiom of the English language [R. 61, 197]. No possible construction by the Territorial Court could change the meaning of Section 4 insofar as Cho is concerned. Under it he is simply deprived of his right to earn his living by teaching.

Secondly, there is no interpretation possible which the Territorial Court could give the statute which would eliminate its constitutional infirmity. Even if the lower court were incorrect in its determination as to the meaning of "average" and the appellants' interpretation is correct and would be followed by the Territorial Court, the statute is still left wanting in that it prohibits the teaching of foreign languages to those bright students who are above "medium character, quality; midway between extremes, ordinary" (B. 81).

Further, even if the Territorial Court were to construe the word "school" in Section 2(a) [R. 12, B. 100] (contrary to its very plain language and to appellants' own proper interpretation [R. 137]) so as not to include the hiring by parents of tutors to teach their children, Section 3 still says that children in the first four grades cannot go to the corporation appellees' schools nor could the school teacher appellee teach therein. It is precisely because of this disability placed upon them by the statute that appellees came to court and upon which question they are entitled to a decision.[j]

Thirdly, it is significant that nowhere is the claim made by appellants that the correct interpretation of the statute (supposedly to be made by the Territorial courts) *is* that parents could or that they would be permitted to hire tutors to teach their children, and thus fall without the meaning of the word "school" of Section 2(a). Appellants cannot complain that the Territorial courts should first interpret the statute when they agree that the construction given by the lower court is correct. With all parties in agreement, the Territorial Court would have no controversy to decide.[k]

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[j] Nor are appellants correct when they say it matters not what effect the statute has on the parents (B. 47). The same question was present in *Pierce v. Society of Sisters*, 268 U. S. 510, 534, where this court held that the Oregon act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" although only the corporation appellee had brought suit and was before this Court on appeal. Such a decision is proper and, indeed, inevitable in a case of this type.

[k] Furthermore even if the statute were to be interpreted to the effect that parents could so hire tutors to teach, the statute is nevertheless invalid because of the discrimination against those parents who have the constitutional right to have their children taught a foreign language, but who are unable to afford the luxury and expense of private tutors. Similarly it deprives those children of poorer parents of their right to learn the foreign language. And see footnote j.

Thus appellants are incorrect, therefore, in their assertion that if the Territorial courts follow their interpretation of the statute, the constitutional invalidity dissolves (B. 45). They have shown no reason for this Court to refuse a decision on the merits. The ensuing analysis of appellants' authorities will demonstrate their inapplicability.

Every case relied on by appellants (B. 40, 42, 46, footnote 34) falls clearly within the exceptional circumstances rule of *Lane v. Wilson*, 307 U. S. 268, 274.

Thus in *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, the constitutionality of a local administrative ruling of the Texas Railroad Commission was being tested. The validity of that ruling depended upon powers given the local Texas Commission by a Texas statute whose validity was not being questioned. Under these special circumstances, this Court applied the doctrine of abstention.

There are in the case at bar no such special circumstances. There is here no local administrative ruling whose validity depends upon an interpretation to be given to some other local law whose interpretation is not before this Court. Further, there is no way the questions in the case at bar could be resolved so as to eliminate the constitutional questions (see discussion, *supra*, following footnote "i").

In *American Federation of Labor v. Watson*, 327 U. S. 582, there was involved a complicated question concerning a new provision of the Florida constitution. Moreover, *quo warranto* proceedings were already pending in the Florida state courts encompassing the very parties and actions before this Court. Here too, then, were special

circumstances justifying awaiting the determination of the state proceedings. This was right in line with the intent of Section 266 of the Judicial Code (28 U. S. C. 380).

No such circumstances are present here. The statute in question is not a new one. It is substantially identical with that held invalid in *Farrington v. Tokushige*, 273 U. S. 284. Furthermore, there are no suits pending in the Territorial courts upon which the federal court could await a determination.

Stephenson v. Binford, 287 U. S. 251, presented a broad and complicated statute of some 22 or more sections. In addition the state authorities had made no threat to enforce any of the provisions of the statute against any of the plaintiffs. Thus the case properly did not call for decision on the merits because a cause of action in equity had not been made (see Point IIB, *supra*). Nevertheless, the Court, after alluding to the fact that no state court had passed on the question, proceeded to adjudicate the merits of the dispute. To the extent that the case is of any assistance at all here, it supports appellees' and not appellants' position.

Spector Motor Service v. McLaughlin, 323 U. S. 101, again involves an extremely complicated question of local law, the resolution of which might largely obviate any federal constitutional question. These again were special circumstances justifying abstention. Furthermore, it might be pointed out that the action was brought to enjoin the enforcement of a state tax and this Court pointed out that there was an adequate remedy in Connecticut to

determine its validity. Accordingly federal abstention was proper because of the "explicit statutory requirement" of the last sentence of 28 U. S. C. 41(1). (See *Lane v. Wilson*, 307 U. S. 268, 274.)

Of course, *Rescue Army v. Municipal Court*, 331 U. S. 549, a case which did reach this Court through the state courts, is merely an application of the settled doctrine of the courts not to pass upon constitutional questions unless it is necessary. Particularly is this so where, as in the *Rescue Army* case, the statutes are highly complex and interrelated and where other statutes have been incorporated by reference whose import and construction have not been determined by the court below and where the issues come to this Court in a highly abstract state (there on a Writ of Prohibition).[1]

None of these considerations is present in the case at bar. There is but one statute, a simple one—not interrelated or interwoven or depending upon other statutes referred to by reference—and the case comes here after a full and complete trial wherein all the facts were developed.

Watson v. Buck, 313 U. S. 387, is not an abstention case at all. Since the state officials had not threatened to

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[1] To the same effect are *Musser v. Utah*, 333 U. S. 95; *United States v. Petrillo*, 332 U. S. 1; and *Federation of Labor v. McAdory*, 325 U. S. 450. To the extent that *United Public Workers v. Mitchell*, 330 U. S. 75, is helpful here it supports appellees, for the court did pass upon the merits of the claim of unconstitutionality (330 U. S. 75, 93). It cannot be said in the case at bar that there is no case or controversy. This is certainly not a "friendly" suit and appellants by their threat to enforce the statute are abridging the fundamental rights of appellees to their immediate and present damage.

enforce any specific provision of either of the two laws before the Court (313 U. S. 387, 399, 400), there was simply no such threat as would warrant the intervention of equity.[m] In the case at bar, of course, there is no question but what appellants threaten and intend to enforce the particular sections being challenged [R. 57, 68, 73, 76].

It thus appears clear that appellants have made out no case for the application of the doctrine of abstention and that the lower court properly proceeded to decide the case on the merits.

In *Public Utilities Com. v. United Fuel Gas Co.*, 317 U. S. 456, 462, 463, this Court stated the rule that applies here:

> "The situation here is quite different from Railroad Commission v. Pullman Co., 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643. Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible."

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[m] In addition there were 42 sections of "a broad comprehensive and multi-provisioned statute" (313 U. S. 387, 400). Contrast this with the case at bar which has but 8 sections including the section as to when the act shall take effect and of which only 3 (Sections 2, 3 and 4) are really involved. Thus if the *Watson* case be, though we submit it should not be, considered an example of the application of the abstention doctrine, it clearly falls within the exceptional circumstances rule of *Lane v. Wilson*, 307 U. S. 268, 274.

Clearly under that decision the instant case should be decided on the merits. The delay in the instruction of the children in Hawaii of the Chinese language has proceeded long enough. Appellants should not be permitted to delay any longer. Witness the following chronology:

1. The schools were closed on December 7, 1941, by military fiat [R. 429];
2. The statute in question went into effect on July 1, 1943 [R. 47, B. 103];
3. The military orders under which the schools were closed were declared illegal by this Court in *Duncan v. Kahanamoku*, 327 U. S. 304, on February 25, 1946;
4. The complaint was filed on November 22, 1946 [R. 3]. The appellants took no action under Judicial Code Section 266 to obtain a territorial determination, though they could have;
5. The application for a preliminary injunction was pending until and denied on January 28, 1947 [R. 115]. Still the appellants took no action under Section 266, though they could have;
6. The matter was pending for trial until June 26, 1947 [R. 118] and through June 28, 1947, when final hearing was held [R. 121]. Still the appellants had taken no action under Section 266, though they could have;
7. Judgment was entered on January 24, 1948 [R. 107].
8. Amended judgment was entered on February 11, 1948 [R. 113].

Under Judicial Code Section 266 appellants had had it within their power for over seven months prior to final hearing in the trial court to obtain the territorial interpretation, which they now claim so important, and to obtain a stay of these very proceedings. They took no action during all that time. Now an additional year and one-half has elapsed and appellants seek further delay. In the meantime the children of Hawaii have already been deprived of foreign language instruction for more than seven years. If *Public Utilities Comm. v. United Fuel Gas Co.*, 317 U. S. 456, 462, 463, means anything at all, it means that this "litigation should be brought to an end as quickly as possible" by this Court rendering a decision on the merits.

Toomer v. Witsell, 334 U. S. 385, should be directly applied to the case at bar. In that case this Court thus answered (at note 15) the same argument raised by appellees here:

> ". . . We agree with the District Court that there is neither need for interpretation of the statutes nor any other special circumstance requiring the federal court to stay action pending proceedings in the State courts."

Here too (1) there is no need for territorial interpretation; (2) in order to test the statute, as suggested by appellants, in the Territorial courts by opening the schools and awaiting a suit to be brought by the appellants would entail expense for which there is no means of recovery; (3) inability to run the schools or running them at the reduced capacity which the statute requires would result "in a substantial loss of business for which no compensation could be obtained"; and (4) the case has already been in the courts long enough, considering the fact that

the years taken out of the lives of the children who are awaiting to start and to complete their language studies can be in no way replaced. A certain number of children in Hawaii will already have to go without that instruction. This Court should not add to that number.

Accordingly appellees were and are properly entitled to the relief sought and granted by the lower court and to a ruling by this Court on the merits of the case, and on the constitutionality of the challenged Territorial statute.[n]

Conclusion.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.

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[n]Appellants' suggestion that if the doctrine of abstention does apply, the case should be dismissed is incorrect. The procedure this court has followed is to "remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptness in the State court. *Spector Motor Service v. McLaughlin*, 223 U. S. 101, 106; *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 501, 502; to the same effect *American Federation of Labor v. Watson*, 327 U. S. 582, 590.